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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte
RICHARD D. KEEVEN and MARI TRUMAN

Appeal 2008-0477
Application 10/748,449
Technology Center 3700

Decided: July 23, 2008

Before ERIC GRIMES, RICHARD M. LEBOVITZ, and MELANIE L. McCOLLUM, *Administrative Patent Judges*.

McCOLLUM, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a system for establishing a gap at a knee joint. The Examiner has rejected the claims as anticipated or obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

STATEMENT OF THE CASE

Claims 24-32 are on appeal. Claims 17-23 are also pending but have been withdrawn from consideration by the Examiner. We will focus on claims 24 and 28, which read as follows:

24. A system for establishing a gap between a femur and a tibia at a knee joint, comprising:

an instrument having (i) a positioning member that defines a femur facing side and a tibia facing side, said positioning member including a first coupler, and (ii) a connector member having a first mating feature;

an augment having a second coupler that cooperates with said first coupler to fix said augment to said positioning member; and

a femoral resection guide having a second mating feature that mates with said first mating feature of said instrument.

28. A system for establishing a gap between a femur and a tibia at a knee joint, comprising:

an instrument having a positioning member that includes a first coupler, said positioning member defining (i) a femur facing side, (ii) a tibia facing side, and (iii), a guide slot configured to receive an intramedullary pin;

an augment having a second coupler that cooperates with said first coupler to fix said augment to said positioning member; and

an intramedually [sic] pin received within said guide slot of said positioning member of said instrument.

Claims 24, 27, 28, 31, and 32 stand rejected under 35 U.S.C. § 102(b) as anticipated by Ritter (US 5,464,406, Nov. 7, 1995).

Claims 25, 26, 29, and 30 stand rejected under 35 U.S.C. § 103(a) as obvious over Ritter in view of Fraser (US 2002/0116009 A1, Aug. 22, 2002).

The Examiner contends that Ritter discloses

> a system for establishing a prosthetic gap between a femur and a tibia at a knee joint comprising an instrument having a positioning member 30, that defines a femur facing side and a

> tibia facing side, the positioning member includes a first coupler, 34, . . . and ha[s] a guide slot, 32, . . . and a connector member, 38, having a first mating feature, an augment, 96, having a second coupler, 86, . . . that cooperates with the first coupler to fix the augment to the positioning member, and a femoral resection guide, 70, having a second mating feature . . . that mates with the first mating feature of the instrument.

(Ans. 3-4.) The Examiner also contends that a "review of figure 8 of the Ritter et al. reference clearly discloses that the flange, i.e., 34, couples/fixes the augment, i.e., 96, to the positioning member, i.e., 30, which is located in the intramedullary canal of the femur, i.e., 27" (*id.* at 5). In addition, the Examiner contends that Ritter "discloses an intramedullary pin, i.e., 182, which is received in the guide slot, i.e., 32, of the positioning member, i.e., 30, of the instrument" (*id.* at 6).

Appellants contend that the Examiner has not set forth a prima facie case that Ritter anticipates claims 24 and 28 (App. Br.[*] 8-11 & 15-17; Reply Br. 2-11).

FINDINGS OF FACT

1. Claim 24 requires an instrument having both a positioning member having a first coupler and a connector member having a first mating feature.

2. Claim 24 additionally requires an augment having a second coupler that cooperates with the first coupler to fix the augment to the positioning member.

3. Claim 28 requires an instrument having a guide slot and an intramedullary pin received within the guide slot.

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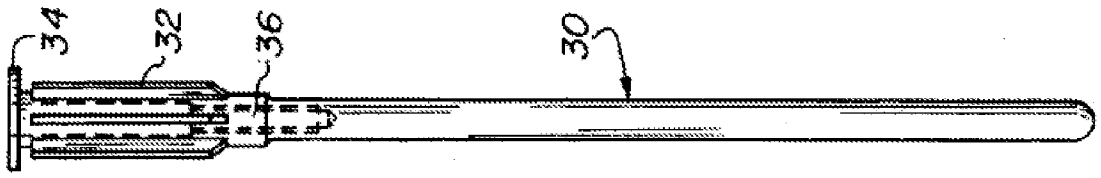
[*] February 2007 Amended Appeal Brief.

4. Ritter discloses a "set of surgical instruments **28** compris[ing] an intramedullary rod **30**" (Ritter, col. 3, ll. 63-64).

5. A portion of Ritter Figure 2 is reproduced below:



This portion of Figure 2 depicts an intramedullary rod 30 (*id.* at col. 3, ll. 57-66).

6. Ritter discloses that the "intramedullary rod **30** . . . comprises a plurality of flutes **32** which are used to prevent rotation of the intramedullary rod **30** when the intramedullary rod **30** is located in the femur **27**" (*id.* at col. 3, l. 66, to col. 4, l. 2).

7. Ritter discloses that "the intramedullary rod **30** also includes a flange portion **34** which is used when impacting the intramedullary rod **30** into the femur **27**" (*id.* at col. 4, ll. 2-5).

8. Ritter discloses that the "intramedullary rod **30** also comprises a blind bore **36** as well as a hex portion **38**. . . . The hex portion **38** is used for attaching other instrumentation to intramedullary rod **30**." (*Id.* at col. 4, ll. 5-10.)

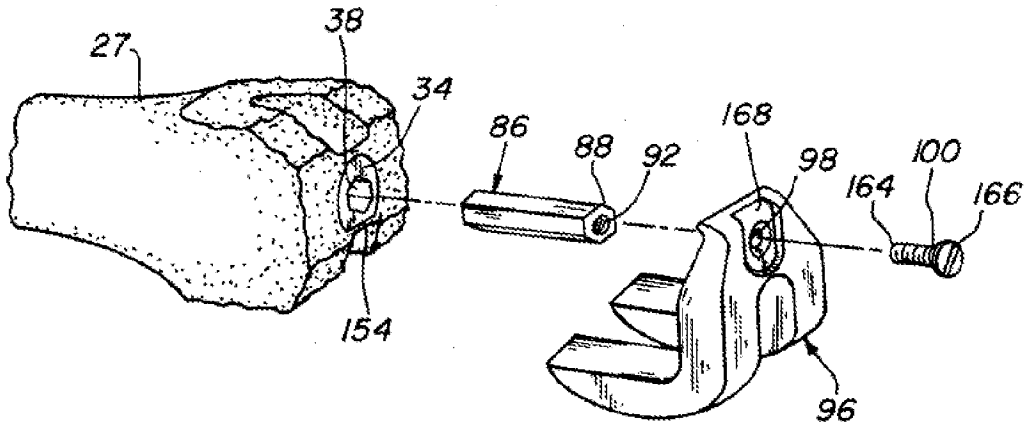
9. Ritter also discloses an angled support member 86 for attaching instruments to the intramedullary rod 30 (*id.* at col. 5, ll. 18-21).

10. Ritter states that the "exterior of the angled support member **86** is hexed shaped so as to be operable to be inserted into the hex portion **38** of intramedullary rod **30**" (*id.* at col. 5, ll. 20-24).

11. Ritter also discloses that the set of surgical instruments includes a femoral provisional 96 (*id.* at col. 5, ll. 47-48).

12. Ritter states that the "femoral provisional **96** comprises a passage **98** which is used for attaching the femoral provisional **96** to angled support member **86**" (*id.* at col. 5, ll. 50-53).

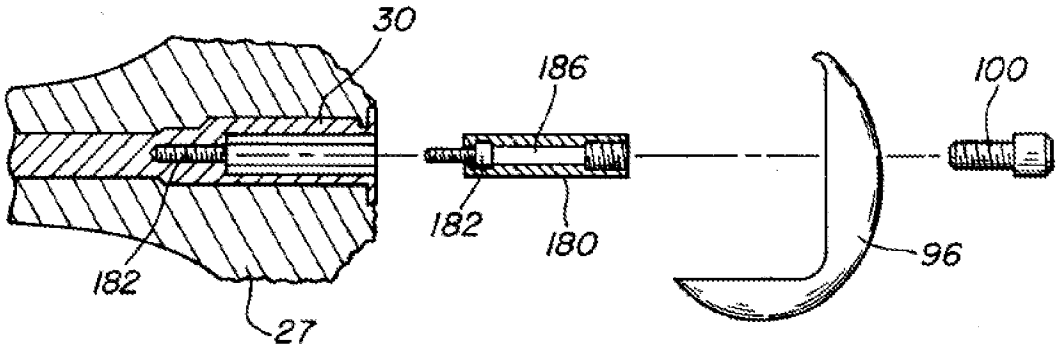
13. Ritter Figure 8 is reproduced below:



This figure depicts an exploded view "showing the use of the femoral provisional" (*id.* at col. 2, ll. 55-57). As depicted in Figure 8, the angled support member 86, which is attached to femoral provisional 96, is inserted into hex portion 38 of the intramedullary rod (*see also* Ritter, col. 9, ll. 16-19). Figure 8 also shows that flange 34 surrounds hex portion 38.

14. Ritter Figures 9 and 10 depict a gap between femur 27 and femoral provisional 96. This indicates that the femoral provisional is not in direct contact with flange 34, which, as depicted in Figure 8 above, is adjacent to femur 27.

15. Ritter Figure 20 is reproduced below:



This figure depicts an embodiment where the "angled support member **180** ha[s] an internal threaded member in the form of a screw **182** . . . to threadably engage a threaded portion **184** of the blind bore **36** so as to secure the angled support member **180** to the blind bore **36**" (*id.* at col. 11, ll. 2-8).

16. In Ritter Figure 20, screw 182 is not received within flutes 32, which, as depicted in Figure 2, are on the outside of intramedullary rod 30, not in blind bore 36.

ANALYSIS

With regard to claim 24, Appellants argue that Ritter's flange does not fix anything to the intramedullary rod (App. Br. 10). In particular, Appellants argue that Ritter's

> angled support 86 is inserted into the bore 36 of the intramedullary rod 30 "until the angled support member 86

> contacts the head 62 of the screw 58." (Ritter at column 9, lines 16-19, see also FIG. 11). Therefore, Ritter only discloses contact between the angled support 86 and both the hex portion of the bore 36 and the head 62 of the screw 58. Ritter never teaches, discloses or suggests that the flange 34 ever contacts the provisional femoral 96 or the angled support 86.

(App. Br. 11.) "Accordingly, because the flange 34 of Ritter plays no role in 'fixing' the provisional femoral 96 to the intramedullary rod 30, Ritter does not disclose a first coupler on the positioning member that performs the function required by the coupler in claim 24" (*id.*).

We agree with Appellants that the Examiner has not set forth a prima facie case that Ritter anticipates claim 24. The Examiner identifies intramedullary rod 30 as the instrument and flange 34 as the first coupler (Ans. 3). The Examiner also identifies femoral provisional 96 as the augment and angled support member 86 as the second coupler (*id.*). Ritter Figure 8 depicts inserting angled support member 86 into hex portion 38 of the intramedullary rod (Finding of Fact (FF) 13). In addition, Ritter Figure 8 shows that flange 34 surrounds hex portion 38 (FF 13). However, we do not agree with the Examiner (Ans. 5) that this Figure demonstrates that flange 34 fixes the femoral provisional to the intramedullary rod. Instead, this Figure demonstrates that hex portion 38, which the Examiner has identified as the first mating feature not the first coupler (Ans. 3), cooperates with the angled support member to attach the femoral provisional to the intramedullary rod (FF 8-14). Thus, we agree with Appellants that the Examiner has not set forth a prima facie case that angled support member 86 cooperates with flange 34 to fix the femoral provisional to the

intramedullary rod. We therefore reverse the anticipation rejection of claim 24 and of claim 27, which depends from claim 24.

With regard to claim 28, Appellants argue that the "flutes of Ritter fail to perform the recited function of receiving an intramedullary pin" (App. Br. 16). In particular, Appellants argue that screw 182 "is positioned within the blind bore 36. Accordingly, when the device of Ritter is assembled with the screw 182 within the blind bore 36, the screw 182 does not interact with the flutes 32 in any fashion." (Reply Br. 6.)

We agree with Appellants that the Examiner has not set forth a prima facie case that Ritter anticipates claim 28. The Examiner identifies flutes 32 as the guide slot and screw 182 as the intramedullary pin (Ans. 3 & 6). The Examiner has not shown that Ritter describes a device in which screw 182 is received by flutes 32 (FF 5-6 & 15-16). Thus, we agree with Appellants that the Examiner has not set forth a prima facie case that Ritter describes an intramedullary pin received within a guide slot, as recited in claim 28. We therefore reverse the anticipation rejection of claim 28 and of claims 31 and 32, which depend from claim 28.

With regard to the obviousness rejection of claims 25, 26, 29, and 30, each of these claims depends from either claim 24 or claim 28. We have already concluded that the Examiner has not set forth a prima facie case that Ritter anticipates claims 24 or 28. In addition, the Examiner has not set forth sufficient basis to conclude that claims 24 and 28 would have been obvious over Ritter. The Examiner relies on Fraser for limitations recited in dependent claims, and has not pointed to any disclosure in this reference that would make up for the deficiencies discussed above. Thus, we conclude that

the Examiner has not set forth a prima facie case that claims 25, 26, 29, and 30 would have been obvious. We therefore reverse the obviousness rejection of these claims.

CONCLUSION

The Examiner has not shown that the claims were anticipated by or would have been obvious to a person of ordinary skill in the art based on the applied references. We therefore reverse the anticipation rejection of claims 24, 27, 28, 31, and 32 and the obviousness rejection of claims 25, 26, 29, and 30.

REVERSED

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